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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 236

MILES EDWARD HAYNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of appeals (R. 11–15) is reported at 372 F. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1967 (R. 16). The petition for a writ of certiorari was filed on March 11, 1967, and was granted on June 12, 1967 (R. 17). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of 26 U.S.C. 5851 making it a crime to possess a firearm that "has not been reg-

istered as required by Section 5841" is, on the face of it, an unconstitutional invasion of the Fifth Amendment privilege. This question involves the following subsidiary questions of statutory construction:

(a) Whether a charge of violating Section 5851 necessarily charges the defendant with a failure to register under Section 5841; and

(b) Whether registration under Section 5841 necessarily incriminates the registrant of a violation of some other provision of the National Firearms Act.

2. Assuming an affirmative answer to question 1, whether the proper remedy is to bar the use of information obtained through a registration under Section 5841, in a criminal prosecution of the registrant, rather than to sanction a failure to register?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's brief (pp. 2–3) adequately sets forth the constitutional and statutory provisions here involved. Since other provisions of the National Firearms Act, and the regulations thereunder, are referred to throughout this brief, we are lodging with the Court copies of Treasury Department Publications No. 364 and 232. The former contains the full text of the National Firearms Act.[1] The latter sets out the full text of the regulations.[2]

[1] Document No. 364 also contains the text of the Federal Firearms Act, see footnote 7, *infra*, which is not in issue here.

[2] Copies of the two publications are also being provided to counsel for petitioner.

STATEMENT

The second count of a three-count information,[3] which was filed on March 4, 1966, in the United States District Court for the Northern District of Texas, charged that (R. 3–4):

> On or about February 8, 1965, in Dallas, Dallas County, Texas, and in the Dallas Division of the Northern District of Texas, MILES EDWARD HAYNES, defendant herein, knowingly and unlawfully possessed a firearm as defined by Section 5848(1), Title 26, United States Code, to wit, a weapon made from a 410 gauge single shot shotgun with a barrel length of 12 5/16 inches, stock cut off, overall length 20-3/8 inches, Serial No. 759885, which firearm had not been registered with the Secretary of the Treasury or his delegate, that is, the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D.C., as required by Section 5841, Title 26, United States Code, and Section 179.98 of Title 26 Code of Federal Regulations, Part 179.

On March 10, 1966, petitioner moved to dismiss this count on the ground (R. 5)[4] that "Section 5851 of Title 28, United States Code, which charges an offense with respect to Section 5841 is unconstitutional and therefore cannot support Count II of the information." This motion was denied on March 25 (R. 6–7).

[3] Petitioner waived indictment (R. 1).

[4] A further ground, "(t)hat Defendant, in lieu of the above, has been denied due process under the Fifth Amendment and his right to a fair trial" is not here urged.

On March 28, petitioner pleaded guilty to Count 2 [5] and on April 7, 1966, he was sentenced to four years' imprisonment (R. 2, 8–9). The judgment was affirmed on appeal against a challenge that reasserted petitioner's claim of unconstitutionality of the statute (R. 11–15, 372 F. 2d 651).

SUMMARY OF ARGUMENT

The National Firearms Act imposes annual occupational excise taxes of $500, $300, $200, $25 or $10 on those whose business is the importation, manufacture, or sale of certain firearms, including the modified shotgun that petitioner had. With specified exceptions, the Act also imposes a $200 excise tax on the making of such weapons by anyone who is not a manufacturer, and a tax of $200 on transfers of some such weapons, and of $5 on transfers of others.

In support of this system of taxation Congress has provided an information-gathering system designed to give the Treasury notice of the existence and location of every weapon that is encompassed within the Act's definition of firearm, so that the tax collector is aware of every item that has or may become subject to tax. The general requirement is that the maker or transferor give advance written notice of the proposed making or transfer of a firearm. There are some exceptions, *e.g.*, when the maker or both the transferor and transferee are subject to the occupational tax. In these latter circumstances record-keeping and reporting requirements apply. There are,

[5] Counts 1 and 3 were dismissed by the government at the time of petitioner's plea of guilty to Count 2 (R. 2).

however, situations where the Treasury either will not gain knowledge of the existence or location of a firearm through the prior notice or records required of makers and transferors, or will learn of it only after a transfer. Section 5841 of the Act is intended to fill this gap and provide the government with the requisite data when other requirements have not. Thus, Section 5841 requires anyone having a firearm in such circumstances to register. The portion of Section 5851 under which petitioner was convicted makes unlawful the possession of a firearm which should have been, but has not been, registered under Section 5841.

Petitioner's argument that registration under Section 5841 necessarily incriminates the registrant of a violation of some other provision of the Act overlooks two ways in which a firearm can be acquired where the possessor must register, but cannot thereby incriminate himself: in a transaction between persons subject to the occupational tax; and in circumstances that do not result in a "transfer" within the meaning of the statute.

There will also be circumstances where the maker or transferor should have filed, but did not make, a report of the transaction to the government. In such a situation registration under Section 5841 theoretically could be "a link in the chain of evidence" in a criminal prosecution of the registrant. An example would be where a person other than a manufacturer has made a firearm from a gun the making of which was not previously taxed, and fails, as Section 5821 requires, to file in advance a declaration of his inten-

tion to make such a firearm with the stamp tax affixed. His making of a gun in such circumstances is criminal, and his continued possession of the firearm after making it is a separate crime, unless he registered under Section 5841. Although his registration would in no way prove that he was the maker, it could give the government a lead to proof of his making. We submit that even in such a case, registration under Section 5841 would incriminate the registrant to no greater degree than a tax return that reports income from an undisclosed and presumptively unlawful source. This Court has previously held, in *United States* v. *Sullivan,* 274 U.S. 259, that the requirement of filing a return in such a situation is constitutionally permissible. Although *Sullivan* can be distinguished from the present case, we believe there are sufficient similarities to justify applying its rationale here.

But even should this Court decide that Section 5841 compels the self incrimination of the registrant, there is nothing in the language of the charge against petitioner or the surrounding circumstances that permit the conclusion that his punishment under Section 5851 was for his own failure to register. His prosecution rested on the fact that he had a weapon that had never been registered, so the tax collector had no notice of its existence, before petitioner acquired it.

Each of the five courts of appeals that has reviewed a case comparable to this one has held that there is no infringement of the constitutional protection against self-incrimination. Any other result would mean that persons in petitioner's position can escape

prosecution in reliance upon the claimed constitutional rights of other unknown persons who are not in court and whose claimed liability to prosecution is wholly speculative.

If all of the foregoing arguments are rejected, we ask the Court, as we do in *Marchetti* v. *United States,* No. 2, this Term, and *Grosso* v. *United States,* No. 12, this Term, to rule that the proper remedy is to bar the use of information obtained from the registration in a criminal prosecution of the registrant, rather than sanction a failure to register. In this way the Court can satisfy both the registrant's asserted need for protection against self-incrimination, and the tax collector's need for the information the registration provides.

ARGUMENT

I. EXAMINATION OF THE STATUTORY SCHEME SHOWS THAT THE CHALLENGED REGISTRATION REQUIREMENT HAS A VALID TAX PURPOSE, DOES NOT REQUIRE AN ADMISSION OF CRIMINALITY, AND COMES WITHIN THE RATIONALE OF *UNITED STATES* V. *SULLIVAN*

Petitioner's contention that he has been punished for a refusal to incriminate himself rests on two propositions that reflect his construction of the statutory provisions and are necessary to his claim that the clause of Section 5851, 26 U.S.C. 5851, that makes it a crime to possess a firearm that "has not been" registered as required by Section 5841, 26 U.S.C. 5841, is invalid on its face. He first asserts that Section 5841 requires registration only in circumstances where the registrant has acquired his firearm in vio-

lation of some other provision of the National Firearms Act and that therefore the act of registration necessarily incriminates the registrant. The second essential step in petitioner's reasoning is the argument that a prosecution under the clause of Section 5851 invoked here necessarily is based on the failure of the defendant to register, rather than on an allegation that no person registered the weapon before the defendant acquired it.

We concede that if petitioner's reading of the two provisions were right, registration under Section 5841 would be incriminatory and, except for the position we advance in the last portion of this brief, petitioner's conviction under Section 5851 would not be valid. But our contention is that petitioner construes neither section correctly. We accordingly turn in this section of our brief to an examination of Section 5841 against the background of the statutory context in which it appears. If we are correct that the purpose and effect of Section 5841 is to require registration where a person who has violated no law obtains possession of a firearm without the knowledge of the tax collector, then the foundation for petitioner's legal position disappears.

A. THE NATIONAL FIREARMS ACT IMPOSES OCCUPATIONAL EXCISE TAXES ON THOSE WHOSE BUSINESS IS FIREARMS, AND, WITH SOME EXCEPTIONS, A TRANSACTIONAL EXCISE TAX ON THE MAKING OF FIREARMS BY THOSE NOT SUBJECT TO THE OCCUPATIONAL TAX AND ON THE TRANSFER OF FIREARMS

The National Firearms Act, 26 U.S.C. 5801–5861, was the outgrowth of a number of bills intended to regulate firearms that were introduced in Congress

following the attempted assassination of then President-Elect Roosevelt in February 1933. See Bakal, *The Right to Bear Arms* (1966) 167–174. The substance of the statute enacted on June 26, 1934 (see 48 Stat. 1236) has been carried forward to the present law, see 1954 United States Code Cong. & Adm. News 4539–4553, 5206–5210, with the sole exception of the 1958 addition to Section 5851 of the clause under which petitioner was prosecuted.

The Act deals with five general categories of weapons and accessories. Thus 26 U.S.C. 5848 defines "firearm" to include (1) shotguns having barrels less than 18 inches long, and rifles having barrels less than 16 inches long; (2) other guns made from a rifle or a shotgun and having an overall length of less than 26 inches; (3) any other weapon, except a pistol or revolver, that can be concealed on the person; (4) machine guns and other automatics; and (5) mufflers and silencers.[6]

A later Congress commented that these particular items were singled out for special excise tax treatment "to make it more difficult for the gangster element to obtain certain types of weapons." S. Rep. No. 1303, 86th Cong., 2d Sess., p. 2 (1960).[7] This Court, while recognizing the "deterrent effect" of the taxes imposed on these weapons, upheld the statute in *Son-*

[6] 26 U.S.C. 5848(2)–5848(5) define "machine gun", "rifle", "shotgun", and "any other weapon".

[7] Other firearms, thought more likely to be used by sportsmen, have been regulated through restrictions placed on their shipment in interstate and foreign commerce. See Federal Firearms Act, 15 U.S.C. 901–909.

zinsky v. *United States*, 300 U.S. 506, stating (p. 513) that "a tax is not any less a tax because it has a regulatory effect * * * an exercise of the taxing power is not any less so because a tax is burdensome or tends to restrict or suppress the thing taxed."[8] See, also, *United States* v. *Miller*, 307 U.S. 174.

The statute imposes three types of excise tax. These are an occupational tax, a making tax, and a transfer tax.

An annual occupational excise tax of $500, $300, $200, $25, or $10 must be paid by those in the business of importing, manufacturing, or dealing in firearms. 26 U.S.C. 5801. The highest tax of $500 is paid by all importers, and by manufacturers who produce any firearm other than certain combination shotgun-rifles and "other weapons" described respectively in Sections 5801(a) and 5848(5). Pawnbrokers pay $300.[8a] Other dealers pay $200 unless their business is restricted to such shotgun-rifles and other weapons. Such other dealers and manufacturers whose business is so restricted pay annual taxes of $10 and $25 respectively.

Section 5821(a) imposes an excise tax on the "making" of a firearm by a person who fails to satisfy two conditions. The tax does not apply if the maker is subject to the manufacturer's occupational tax, see 26 U.S.C. 5821(b)(1) and 5848(7), or if the weapon

[8] Petitioner expressly disclaims any challenge to the use of the taxing power for the "worthy goal" of regulating the type of weapon here in question (Br. 5).

[8a] 26 U.S.C. (1964 ed.) 5801(a)(3) erroneously states the tax for pawnbrokers to be $200. See 74 Stat. 149.

is made "from another firearm with respect to which a tax has been paid" previously under Section 5821(a), see 26 U.S.C. 5821(b)(2).

Section 5811(a) imposes a $200 excise tax on the transfer in the United States of any firearm other than the weapons that are the subject of the lesser occupational taxes. Transfers of these latter guns are subject to a $5 excise.

An exception from tax is granted whenever a firearm is made for the use of, or transferred to, a domestic governmental body, or "any peace officer or any Federal officer designated by regulations of the Secretary or his delegate." 26 U.S.C. 5812(a)(1)-(2), 5821(b)(3).[9] Nor is tax imposed on an "unserviceable" weapon "which is transferred as a curiosity or ornament", 26 U.S.C. 5812(a)(3), or on transfers between persons subject to the occupational tax, 26 U.S.C. 5814(c); see Treas. Regs. § 179.103, 26 C.F.R. In addition, the transfer tax will be refunded if paid by a manufacturer, and the transferee exports the weapon. 26 U.S.C. 5844.[10] These exemptions are similar to the pattern found generally in federal excise tax statutes, which, for example, exempt from the Manufacturer's Excise Tax on such items as automobiles and refrigerators sales for further manufac-

[9] Such "peace officers" are defined in Treas. Regs. § 179.104, 26 C.F.R.

[10] The National Firearms Act imposes no tax on importation. However, Section 5845 bans importation except of a firearm that "is unique or of a type which cannot be obtained" domestically, and where "the purpose thereof is shown to be lawful * * *."

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ture or export, or to state governmental bodies, or nonprofit educational organizations, see 26 U.S.C. 4221(a).[11]

B. COMPREHENSIVE RECORD KEEPING AND REPORTING REQUIREMENTS, OF WHICH SECTION 5841 IS ONE, ARE DESIGNED TO GIVE THE TREASURY NOTICE OF THE EXISTENCE AND LOCATION OF EVERY PERSON AND FIREARM THAT IS OR MAY BE TAXABLE

The National Firearms Act, like every federal tax measure, contains extensive reporting requirements designed to facilitate the collection of tax by giving the collector notice of each person, chattel, and transaction that is or may become taxable. The registration requirements of Section 5841 must therefore be measured against the background of the entire information-gathering scheme of an Act of which the section is but one integral part.

The occupational taxes are enforced through the registration requirements of Section 5802; annually, each person subject to the tax must register, and pay the tax, in each district in which he has a principal or other place of business. Every manufacturer and importer is also required to place on every firearm "a number and other identifying marks * * *." 26 U.S.C. 5843. Section 5842 gives the Treasury broad discretion to require such persons to "keep * * * books and records and render * * * returns in relation to the transactions in firearms specified in this chapter * * *." This latter provision has been implemented by a requirement that such persons keep records, accessible for inspection, that show:

[11] See also 26 U.S.C. 4253(c), 4263 (b), (c).

"the manufacture, receipt, transfer or other disposition of all firearms"; the date of any such occurrence; identifying characteristics of each firearm; and the name and address of each transferee. This same information is to be reported by return "[i]mmediately upon the manufacture, receipt, transfer or, other disposition of any firearm * * *." Treas. Regs. §§ 179.150, 179.151, 26 C.F.R.

Section 5821(e) deals with persons subject to the tax on making imposed by Section 5821(a). It forbids any such person to make a firearm without first filing with the government a written declaration of his intention, with the appropriate tax stamp affixed. The Treasury has authority to require persons not subject to Section 5821(a) to make such report of their making of a firearm as is considered necessary. 26 U.S.C. 5821(b). In exercise of this authority, the Treasury has required such manufacturers to keep the records and make the returns described in Sections 179.150 and 179.151 of the Regulations, *supra*. See Treas. Regs. § 179.82, 26 C.F.R.

Reporting requirements relating to the transfer of firearms are found in Sections 5814 and 5812(b). A taxable transfer may not be made unless the transferor obtains a written order from the transferee, 26 U.S.C. 5814(a), adds to it information identifying the firearm, 26 U.S.C. 5814(b), affixes the stamp tax, 26 U.S.C. 5813, and forwards a copy of the order to the Treasury, 26 U.S.C. 5814(b). Where the transfer is not taxable because it is between persons subject to the occupational tax, the Treasury has authority to

require informational records and reports; no special provision is made apart from those in Sections 179.150 and 179.151 of the Regulations, *supra*. Where the exemption is based on a transfer to a government or a peace officer, or the unserviceable nature of the weapon, Congress requires that the transferor "shall notify" the Treasury of the name and address of the transferee, the date of transfer, and the identifying characteristics of the firearm. 26 U.S.C. 5812(b); Treas. Reg. § 179.105, 26 C.F.R.

The foregoing reporting and record-keeping provisions, if complied with, are adequate to give the Treasury advance notice of the existence and location of every firearm the making or transfer of which will occur in circumstances requiring payment of a tax. They are in addition adequate to provide after-the-fact information of the nontaxable making of any firearm and most exempt transfers, occurring after the effective date of the Act.

However, none of the provisions described above would have given the Treasury data with respect to weapons in existence when the National Firearms Act was adopted. Nor do they cover every circumstance where a firearm may change hands, or where one has been imported in unwitting violation of the Act.[12] Moreover, in exempt transactions, as between manufacturers and dealers, the transferor is not re-

[12] Although importation is as a general matter forbidden, see footnote 10, *supra*, importation is a crime only if it occurs "fraudulently or knowingly * * * in violation of" the Act. 26 U.S.C. 5853(1).

quired to give advance notice of the transaction, so that the transferee may acquire possession before any notice is given the Treasury. And there inevitably will be circumstances where, through a transferor's failure to comply with Section 5814(b), the government does not receive notice of the transferee's possession. The language and history of Section 5841 show that it and its predecessors were intended to fill these gaps in the information that the other provisions of the Act provide to the tax collector.

The first antecedent of the present provisions was Section 5(a) of the Act originally adopted on June 26, 1934. It had a registration feature designed to provide a register of the total number and types of firearms in the country as of September 24, 1934, which would be subject to tax if and when transferred. Thus Section 5(a) required that, within 60 days after the effective date of the new statute (July 26, 1934), every person possessing a firearm should register the weapon with the Internal Revenue Service. There was a proviso, however, that "no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act." 48 Stat. 1238. The obvious purpose of the proviso was to avoid registrations that would merely duplicate information already given the Treasury.

The question then arose whether the registration requirement ended with the 60-day period between July 26 and September 24, 1934. The Act was therefore amended in 1939 through the addition of Section

3261(b) of the Internal Revenue Code of 1939, 26 U.S.C. 3261(b) (1946 ed.). That section was intended to make clear that the requirement of registration was a continuing one "with respect to any firearm acquired after July 26, 1934 * * *." The requirement was carried forward in the 1954 recodification of the Code, *i.e.*, in the present Section 5841,[13] which is the focus of petitioner's contention.

C. REGISTRATION UNDER SECTION 5841 GENERALLY CAUSES NO INCRIMINATION AND IN NO CIRCUMSTANCE RESULTS IN MORE SPECIFIC IDENTIFICATION OF CRIMINAL CONDUCT THAN THE FILING REQUIREMENT APPROVED IN *UNITED STATES* V. *SULLIVAN*

The precise language of Section 5841 is as follows:

> Registration of persons in general: Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer * * * importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

Its language is clear enough. The first sentence, in the most general of terms, requires "every person

[13] The present language is essentially that which was developed in a 1952 amendment to Section 3261(b) of the 1939 Code, 66 Stat. 88.

possessing a firearm [to] register * * *." The second sentence provides an exception for those who possess a firearm as the result of an acquisition that was subject to the Act, provided the applicable provisions were complied with.

Any confusion as to the purport of Section 5841 thus results not from the language of that section. Rather, any misconception of its purpose—and any holding that the Fifth Amendment forbids such a registration requirement—results from a failure to recognize two salient features of the exception to registration that the second sentence grants: *First,* it is possible to acquire a firearm other than by a "making" or "transfer" as those terms are used in the statute; and *second,* in a transfer between persons subject to the occupational tax, the advance notice provisions of Section 5814 do not apply.

Petitioner's case is built on his assertion that "It is difficult to conceive of one possessing a firearm that he has not either made or acquired by transfer, especially in light of the expansive definition given to 'transfer' for purposes of the act. 26 U.S.C. § 5848 (10)." (Br. 7.) But that "expansive" definition fails to cover a variety of circumstances. The language of section 5848(10) is:

> "The term 'to transfer' or 'transferred' shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of."

For example, no provision is made for the person who finds and keeps a lost or abandoned weapon. Nor does

the statute define as a transfer the placement of a firearm in the hands of the owner's agent or bailee; but surely the agent or bailee secures possession.

Experience during the 33 years of administration of the National Firearms Act has demonstrated that these are real and not merely theoretical possibilities. Indeed, any difficulties of conception should have been laid to rest by the circumstances of *United States* v. *Forgett*, 349 F. 2d 601 (C.A. 6), certiorari denied, 383 U.S. 926, a case of which petitioner takes no note. There the Sixth Circuit affirmed a conviction of a firearms dealer for a violation of section 5855. That section, in close analogy to section 5851, under which petitioner was convicted, states:

> It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

Forgett was accused of trucking from Wisconsin to Ohio machine guns that he had purchased from another dealer [14] and failed to register under section 5841. Because the transaction was between dealers, the transfers were expressly exempted from requirements

[14] Forgett claimed he was acting as the agent of the Wisconsin dealer. See Petition for Writ of Certiorari *Forgett* v. *United States*, No. 861, October 1965 Term, at p. 5. This claim, if true, would not have changed Forgett's duty to register. But the contention emphasizes the incompleteness of the definition of "transfer" in section 5848(10).

of section 5814(a). When Forgett agreed to take the guns, he came under a duty to register under section 5841. No doubt, he was allowed a reasonable time in which to register.[15] See *Northern Pacific Railway Co.* v. *United States,* 213 Fed. 162 (C.A. 8), affirmed 242 U.S. 190. But until he registered he had a duty to keep any movement of the guns wholly intrastate. Had he registered the guns first, he would not have violated Section 5855, and could have in no manner incriminated himself. See 349 F. 2d at 604.

Even where a weapon has been made or transferred in violation of the Act, it does not necessarily follow that the registration of the owner or the transferee is self-incriminatory. In the case of a making, one person can make a firearm by modifying a weapon that is owned and possessed by another person. In such a case, the owner commits no crime in connection with the making; but if he wishes to continue to possess the weapon after its modification he must register under Section 5841. That registration can in no way incriminate him, but only serves to eliminate any possibility of criminal prosecution.

Nor would a transferee necessarily incriminate himself through registration. The obligation to file and pay tax in advance of transfer is imposed by Section 5814. While the transferee must provide information to be entered on the form, Section 5814(a) makes it "unlawful for any person *to transfer* a firearm" without the written order. Section 5814(b) requires "every

[15] Since Forgett agreed to take the guns two weeks before he had them shipped, he had adequate opportunity to register his possession before his shipper took possession on his behalf.

person so transferring a firearm" to "forward a copy of such order to the" Treasury. Thus the filing obligation is entirely the transferor's and not the transferee's. A transferee could in good faith provide the transferor with all the information required, but the transferor could fail to file, which would impose on the transferee a duty to register. If he did register, he could be convicted of no crime.[16]

Even if it is uncommon for a person to acquire possession of a firearm in a manner not subject to Section 5814(a) or Section 5821(a), such acquisitions do occur, and Section 5841 is intended to apply to them in a manner that would not cause the registrant to incriminate himself in any way. Consequently, the clause in Section 5851 under which petitioner was convicted cannot be deemed unconstitutional on its face.

The registration requirement of Section 5841 also could apply to someone who has acquired a firearm in a manner subject to Section 5814(a) or Section 5821(a), but without complying with the statutory requirements. Such a person would thereby violate that portion of Section 5851 which makes it

[16] Another pertinent example arose when a dealer in salvage purchased a large amount of scrap metal from a Navy depot in Utah and found approximately 4,000 Thompson sub-machine guns which by error had not been destroyed before delivery was made. We assume no criminal liability would be incurred by such a purchase, although the guns would have to be destroyed or the guns registered and a tax paid if the buyer wished to retain them legally. Generally speaking a like circumstance could arise whenever a firearm is obtained from a governmental agency, which is not a "person" within the meaning of the Act, see 26 U.S.C. 5848(11), and therefore is not subject to the duties imposed on transferors.

unlawful "to receive or possess any firearm which has at any time been transferred * * * or which has at any time been made in violation of" Section 5814(a) or 5821(a). But this does not mean that a person incriminates himself of such an offense by registering under Section 5841, as he must do if his continuing possession is not to be an additional crime under the clause of Section 5851 that was applied to petitioner.

Registration shows only possession. It does not prove, or lead in any obvious or general way to evidence of, an acquisition or making where the transferor or maker failed to comply with Section 5814(a) or Section 5821(a). It may well be that registration of a firearm of which the Treasury has previously received no notice will stimulate an investigation that will produce evidence that the registrant or some prior possessor made or received the gun in violation of the Act. But since the government would have the burden of showing how the making or transfer occurred in a prosecution for receipt or possession of a weapon transferred or made unlawfully, and since it is possible to acquire or make a gun in a circumstance that does not require compliance with the provisions of Section 5814(a) or 5821(a), the registration does not even show that the making or an acquisition was in some way unlawful.

Even if registration leads the government to the other evidence necessary to establish an unlawful acquisition or making, it does not follow that the registration compelled self-incrimination in the Constitutional sense. We submit that such a situation is sufficiently similar to *United States* v. *Sullivan*, 274

U.S. 259, to warrant applying the *Sullivan* rationale here. *Sullivan* holds that the Fifth Amendment does not excuse the filing of an income tax return where the source of the income was an unlawful activity. This Court ruled "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.* at 263. Therefore Sullivan was entitled to refuse to disclose the source of his income, although he could not "refuse to state the amount of his income because it had been made in crime." *Id.* at 264. Yet, a refusal to state the source of income may well suggest to the tax collector that the taxpayer has engaged in criminal conduct, and thus could lead the government to evidence of unlawful activity, just as could the filing of a firearm registration under Section 5841. See, generally, Mansfield, *The Albertson case: Conflict Between the Privilege Against Self-Incrimination and the Government Need for Information,* 1966 S. Ct. Rev. 103, 114–119.

Sullivan was different from the present case to the extent that "the questions in the income tax return were * * * directed at the public at large * * *", *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, whereas the National Firearms Act applies to the relatively small group of people who wish to possess guns that fall within the definition of firearms in 26 U.S.C. 5848(1). But the mere fact that there are a greater number of people subject to the filing requirements of the income tax law does not

mean that those persons subject to the overall reporting requirements of the National Firearms Act incur a greater probability of incrimination through compliance than the public at large does in filing income tax returns. There are those, such as Sullivan, who cannot comply with the income tax requirements without incurring some risk of incrimination. But any person who wants to possess a firearm can find a lawful way to do so that does not incriminate him. The registration form—Form 1—used under Section 5841 (Pet. Br. 29 App. B) in fact requires no information that is not called for in Form 1A and Form 4, which, respectively, are used for the declaration of intent to make a firearm pursuant to Section 5821(c), and upon a transfer of a firearm under Section 5814(a).[17] There has been no claim that either of these forms is inherently incriminating. If anything, Form 1 asks for less information than the other two, since it does not ask disclosure of the manner of making or acquisition. Although Form 1 asks the date of acquisition, a registrant presumably could rely on the Fifth Amendment in refusing to provide that date. This case is much like *Sullivan* in that a failure to register "would make the taxpayer rather than a tribunal the final arbiter of the claim" of privilege. 382 U.S. at 79. As this Court pointed out in *Sullivan,* such a result would unnecessarily allow a taxpayer to draw "a conjurer's circle around the whole matter." 274 U.S. at 264.

We recognize that two courts of appeals and two

[17] Copies of Forms 1A and 4 are attached to this Brief as Appendices A and B respectively.

district courts have taken the view that a registration under Section 5841 is necessarily incriminating. *Russell* v. *United States*, 306 F. 2d 402, 408 (C.A. 9), so held, on the assumption that every person who registers a firearm under Section 5841 "thereby admits * * * that he did not acquire or make it in compliance with section 5851 [*sic*]." *Russell* was followed in *Dugan* v. *United States*, 341 F. 2d 85 (C.A. 7); *McCann* v. *United States*, 217 F. Supp. 751 (D. Colo.); and *United States* v. *Fleish*, 227 F. Supp. 967 (E.D. Mich.). The Fifth Circuit has indicated its agreement with those holdings. See *Lovelace* v. *United States*, 357 F. 2d 306 (C.A. 5); *Haynes* v. *United States* (R. 13). In those cases the government did not present the overall view of the National Firearms Act set forth above. Doubtless, this failure materially contributed to the conclusions reached. We point out, however, that when these arguments were presented, in *United States* v. *Forgett, supra*—a case where the record demonstrated that the registration requirement of Section 5841 can, and is intended to, apply in situations where no incrimination can possibly result—the court recognized that registration need not admit criminality. See 349 F. 2d at 604.

Nor, once the *Russell* construction of Section 5841 is rejected, is there anything to petitioner's reliance on such cases as *Albertson* v. *Subversive Activities Control Board, supra*. *Albertson* involved the statutory requirements that persons register their affiliation with the Communist Party, which was found an invalid infringement of the Fifth Amendment privilege. In so ruling this Court rested its decision on the fact

that the registration requirement was "directed at a highly selective group inherently suspect of criminal activities" (p. 79). But we understand the "criminal activities" of which Albertson and like persons were "inherently suspect" to refer to the one fact that registration would admit—membership in the Communist Party. For this Court stated (p. 77):

> Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act, 18 U.S.C. § 2385 (1964 ed.), or under § 4(a) of the Subversive Activities Control Act, 64 Stat. 991, 50 U.S.C. § 783(a) (1964 ed.), to mention only two federal criminal statutes. *Scales* v. *United States*, 367 U.S. 203, 211. Accordingly, we have held that mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege. * * *

Here, the fact that would be admitted by registration is possession of a firearm. Such possession is not a federal crime. As we have acknowledged, it may well result in an inquiry as to whether the registrant has complied with other provisions of law. So much is inherent in virtually every tax or regulatory scheme which depends upon the device of record-keeping and self-reporting. But, as *Sullivan* shows, that is not of itself sufficient to establish that a tax or regulatory measure offends the Fifth Amendment.

Nor is this a case in which registration would itself show a violation of state law. Texas, the State where petitioner was charged to have possessed a modified shotgun, and many other states, do not forbid such

possession.[18] While 18 states, including Texas,[19] do prohibit the possession of machine guns, which are firearms within the meaning of the National Firearms Act, the others either restrict no more than the possession of concealed weapons, or limit their regulation of firearms to registration of some firearms or the licensing of dealers.[20]

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[18] Only three states, the District of Columbia and the Virgin Islands have such an explicit prohibition. See Calif. Penal Code § 12020; D.C. Code tit. 22, § 3214; Smith-Hurd Ill. Ann. Stat. tit. 38, S. 24–1; N.Y. Penal Code §§ 1896, 1897(3). Virgin Is. Code Ann. §§ 23–453. However, some of the statutes from states other than Texas cited in footnote 19, *infra*, define "machine gun" in a manner that would include some types of modified shotguns.

[19] See Conn. Gen. Stat. Ann. tit. 53, § 202; Del. Code Ann. tit. 11, § 465; Rev. Laws of Haw. (1955) § 157.8; Burns Ind. Stat. tit. 10, § 4712; Ia. Code Ann. § 696.1; Kans. Stat. Ann. tit. 21, § 2601; La. Rev. Stat. tit. 40, § 1752; Minn. Stat. Ann., § 609.67; Vernon's Ann. Mo. Stat. § 564.590; Rev. Stat. of Nebr. (1943, Re-issue of 1956) tit. 28, § 1010; N. Jer. Stat. Ann. 2A, § 151–50; Gen. Stat. of N. Car. tit. 14, § 409; Oreg. Rev. Stat. §§ 166.250(1), 166.410; Purdon's Penna. Stat. Ann. tit. 18, § 4629; Gen. Laws of R.I. (1956) § 11–47–8; Code of Laws of S. Car. (1962) tit. 16, § 123; Tex. Penal Code §§ 489b, 489c; Rev. Code Wash. Ann. § 9.41.190.

[20] See Code of Ala. (1958) tit. 14, §§ 161 to 165; Alaska Comp. Stat. Ann. § 65–12–1; Ariz. Rev. Stat. Ann. tit. 13, § 911; Ark. Stat. Ann. (1947) tit. 41, §§ 4507 to 4517; Ark. Stat. Ann. (1947) tit. 41, §§ 4507 to 4513; Colo. Rev. Stat. (1963) §§ 40–11–1, 40–11–10; Fla. Stat. Ann. §§ 790.01 to 790.24; Code of Ga. Ann. §§ 26–5101 to 26–5112; Kent. Rev. Stat. (1953) § 435.230; Me. Rev. Stat. Ann. §§ 15–391 to 15–393, 25–2031; Ann. Code of Md. (1957) §§ 27–372 to 27–383; Mich. Stat. Ann. (1962) §§ 28.91 to 28.100; Miss. Code Ann. (1942) §§ 2079 to 2086; Rev. Codes of Mont. (1947) §§ 94–3525 to 94–3527; Nev. Rev. Stat. §§ 202.340 to 202.360; N. Hamp. Rev. Stat. Ann. (1965) § 585.26; N. Mex. (1953) §§ 40A–7–1 to 40A–7–3; N. Dak. Cent. Code Ann. §§ 62–02–01 to 62–02–07; Page's Ohio Rev. Code Ann. §§ 2923.01 to 2923.05; Okla. Stat. Ann §§ 1272 to 1280; Oreg. Rev. Stat. §§ 166.210 to 166.470; S. Dak. Code of 1939 § 13.1609; Tenn. Code Ann. §§ 39–4901 to 39–4908; Utah Code §§ 76–23–1 to 76–23–7; Vt. Stat. Ann. § 4003; Code of Va. §§ 18.1–

II. ASSUMING THAT A REGISTRATION UNDER SECTION 5841 NECESSARILY INCRIMINATES THE REGISTRANT, THE FIFTH AMENDMENT NONETHELESS PERMITS PROSECUTION FOR POSSESSION OF A FIREARM THAT "HAS NOT BEEN REGISTERED AS REQUIRED BY SECTION 5841"

In this portion of our brief we assume *arguendo* that the reading given Section 5841 in *Russell* and like cases is correct—that registration under Section 5841 necessarily admits "an actual or presumptive violation of law." 306 F. 2d at 409. Making that assumption, we would concede that, if the charge against petitioner under Section 5851 were in substance a charge that he possessed a gun which *he* had failed to register, the Fifth Amendment would forbid his conviction, unless this court adopts the use-restriction rule we suggest in the last part of this brief. The court below so held in *Lovelace* v. *United States, supra.* But in our view the charge against petitioner is that he possessed a gun that *no one* had registered before he acquired it.

That this is the crime defined by Section 5851 seems to follow from the language of Section 5851 itself. The act stated to be unlawful is "to possess any firearm which *has not been* registered as required by Section 5841". (Emphasis added.) The language is in the past tense. It necessarily refers to registration before the accused acquired possession of the gun. Indeed, if it were read as referring to the accused's failure to register, the clause would be merely dupli-

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258 to 18.1–268, PC 483 to 489C; W. Va. Code §§ 61–7–1 to 61–7–8; West's Wisc. Stat. Ann. §§ 164.01 to 164.20, 941.20 to 941.23; Wyo. Stat. (1958) §§ 6–237 to 6–246.

cative of Section 5841. Moreover, this portion of Section 5851 omits the phrase "at any time," found in the clauses relating to possession of guns transferred or made in violation of the Act. The obvious purpose is to inhibit traffic in firearms of which the tax collector has no notice and therefore has never had the opportunity to keep track of for purposes of discovering taxable transactions. The government, in a case such as this, therefore has the burden of proving that there has never been registration under Section 5841. We believe that the government must go further, and prove that it has not secured notice of the existence of the gun through either Section 5814 or 5821. Otherwise, there would be no proof that Section 5841 ever required registration.

Thus there was no need to charge that petitioner failed to register. Nor does the information make that charge. Indeed, such a charge would not be encompassed within Section 5851, for it would have the inherent defect of failing to allege that the gun had never been registered before petitioner obtained it. Petitioner's offense was therefore not failure to register; it was his continuing possession of a modified shotgun that no one had registered. His acquisition of the gun may or may not have been unlawful. But it was open to him, before he acquired the gun or within a reasonable time thereafter, to determine whether the government had in any way received notice of its existence. His offense was his continued possession of the gun when its existence had never been reported to

the Treasury. As was said of the defendant in *Starks* v. *United States*, 316 F. 2d 45, 46 (C.A. 9),

> "It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense * * *. Appellant did not have to accept or acquire possession of the gun, and *when he did so, that gun not having been registered by any one, the offense was complete.*" * * * [Emphasis supplied.]

At most, therefore, petitioner is arguing that he is immune from prosecution because some prior possessor of the gun could not have registered it without having incriminated himself. The assumed invalidity of Section 5841 would not make it impossible, as petitioner contends (Br. 14–15), for the government to show that someone had the opportunity to take action that would not have been self-incriminating. However the gun was made, the maker had the opportunity to comply with Section 5821, or the record keeping and reporting requirements imposed upon manufacturers. If the maker was a manufacturer, the first transferor to a transferee who was not subject to the occupational tax had the opportunity to comply with Section 5814. Accordingly, the maker or one transferor at the least had the opportunity to provide the government with notice of the existence of the gun without incriminating himself, and in a way that would have made petitioner's prosecution impossible. For, as we have indicated above, if any notice had been given under Section 5814 or Section 5821 the charge against petitioner could not

stand, because the government would have been unable to prove that registration had ever been required under Section 5841.

This consideration apart, petitioner at best would be resting his constitutional claim on a violation of another's constitutional rights in circumstances where the other person is unknown and his liability to prosecution is entirely hypothetical. We question whether the protection of these unknown persons requires that petitioner be immune from prosecution, even though he voluntarily acquired a gun that had never been registered or brought to the government's notice. Every court of appeals that has considered this issue has concluded, as we argue, that the potential infringement of that other person's constitutional rights is so remote that it does not warrant a prohibition upon the prosecution of someone in petitioner's position. See, in addition to the decision below, *Pruitt* v. *United States*, 364 F. 2d 826 (C.A. 6); *Decker* v. *United States*, 378 F. 2d 245 (C.A. 6); *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *Frye* v. *United States*, 315 F. 2d 491 (C.A. 9); *Starks* v. *United States*, *supra*; *Taylor* v. *United States*, 333 F. 2d 721 (C.A. 10); *Castellano* v. *United States*, 350 F. 2d 852 (C.A. 10), certiorari denied, 383 U.S. 949. We consider it particularly persuasive, that with only one exception, this conclusion has been reached in every jurisdiction where Section 5841 has been ruled invalid. Thus, the Ninth Circuit, in *Frye* and *Starks*, distinguished *Russell*. The opinion below distinguished *Lovelace* (R. 13–15). *Taylor* cited, 333 F. 2d at 722, the district court opinions in *McCann*,

and *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), but distinguished them along with *Russell.* In like manner *Pruitt* and *Decker* found *United States* v. *Fleisch, supra,* inapplicable. We similarly urge this Court to hold that any conflict with the Fifth Amendment is too remote to warrant invalidation of Section 5851, even if Section 5841 is deemed unconstitutional.

III. ASSUMING THAT A REGISTRATION UNDER SECTION 5841 INCRIMINATES THE REGISTRANT AND THAT A CHARGE UNDER SECTION 5851 THEREBY INFRINGES ON THE PRIVILEGE ~~FAILURE TO REGISTER~~, THE PROPER REMEDY WOULD BE TO RESTRICT THE USE OF INFORMATION OBTAINED THROUGH THE REGISTRATION.

In *Marchetti* v. *United States,* No. 2, this Term, *Grosso* v. *United States,* No. 12, this Term, and *Costello* v. *United States,* No. 41, October Term, 1966, we have argued that if this Court rules that the registration provisions of the wagering tax statutes are incriminatory the proper remedy would be to bar the use of information gained through the registration in a prosecution for wagering, rather than to sanction a failure to register. We submit that the present case would be an equally appropriate instance for the application of such a use-restriction rule; rather than repeat them at length, we adopt by reference here the arguments made in our *Marchetti, Grosso,* and *Costello* briefs.

The registration at issue here serves the interest of the federal government in determining the identity and location of firearms that have, in the past, or may in the future, become subject to the excises

imposed by the National Firearms Act. If this Court's view is that the registration provisions of Section 5841 require the registrant to admit a failure to comply with other portions of the Act, and that a prosecution under Section 5851 thereby infringes on the privilege ~~iture to register~~, we would urge that the Court should nonetheless refrain from a ruling that would forbid such prosecutions and thus make it impossible for the tax collector to obtain information that is unavailable except through Section 5841 registrations. The alternative remedy—a ruling that neither a registration under Section 5841 nor the information secured from such a registration may be used in a prosecution for a failure to comply with other provisions of the National Firearms Act (such as the other clauses of Section 5851 or the advance notice requirements of Section 5814 and Section 5821)—would avoid any possibility of a registrant's own words being used in any manner to convict him. It would at the same time permit the Treasury to obtain the information needed for effective administration of the tax provisions of the National Firearms Act.[21]

[21] We believe that affirmance should result if the Court declines to accept our position that Section 5851 is not incriminatory, but does accept our suggested use-restriction approach. The decisions on point, see p. 30, *supra*, had all upheld Section 5851, so that petitioner cannot contend he had reason to believe his conduct was constitutionally protected. See our briefs of last Term in *Costello* (pp. 25–26) and *Grosso* (pp. 28–29).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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APPENDIX A

FORM **IA** (FIREARMS)
(REV. SEPT. 1964)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

DECLARATION OF INTENT TO MAKE A FIREARM

(Chapter 53, Internal Revenue Code)

(Execute in DUPLICATE. Read INSTRUCTIONS on page 3 carefully before completing form)

THE FOLLOWING ITEMS WILL BE COMPLETED BY DECLARANT

The undersigned hereby declares his intention to make a firearm as required by Section 5821 of the Internal Revenue Code.

1. DATE

2. NAME AND ADDRESS OF DECLARANT *(Type or print name of individual or firm - number, street, city or town, State, Zip code)*.

A $200.00 "NATIONAL FIREARMS ACT" stamp may be obtained from your DISTRICT DIRECTOR OF INTERNAL REVENUE and must be securely affixed by the maker in this space and canceled by writing his initials and the date thereon in ink. When completed, this declaration in duplicate must be transmitted to the DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, WASHINGTON, D. C., 20224.

3. NAME AND ADDRESS OF EXECUTIVE OFFICER IF APPLICANT IS OTHER THAN AN INDIVIDUAL

4. HAVE YOU BEEN CONVICTED OF A FELONY? ☐ YES ☐ NO

5. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, etc.)*

6. LENGTH OF BARREL *(Inches)*	7. MODEL	8. CALIBER OR GAUGE	9. SERIAL NUMBER

10. OTHER MARKS OF IDENTIFICATION	11. NAME AND LOCATION OF ORIGINAL MANUFACTURER OF FIREARM *(If prototype, furnish plans and specifications)*

12. WHAT IS YOUR OBJECT IN SEEKING TO MAKE THE FIREARM?

I declare under the penalties of perjury that the firearm is being made for a lawful purpose and that the answers given in response to questions 3 to 12 inclusive are, to the best of my knowledge and belief, true, correct, and complete.

13. SIGNATURE OF DECLARANT	14. TITLE OR STATUS *(Individual member of firm, if officer of corporation, give title)*

Information called for in items 18 thru 20 on reverse of this form must be furnished, unless declarant is other than an individual.

DO NOT WRITE IN THIS SPACE

15. THE DECLARATION OF INTENT TO MAKE THE FIREARM DESIGNATED HEREIN HAS BEEN EXAMINED AND THE MAKING OF THE FIREARM IS

☐ APPROVED ☐ DISAPPROVED FOR THE FOLLOWING REASON:

16. DATE	17. SIGNATURE *(Director, Alcohol and Tobacco Tax Division)*

18. FINGERPRINTS *(Under no circumstances will this declaration be considered without individual's fingerprints):*

The fingerprints must be clear for accurate classification and should be taken before someone properly equipped to take them.

The declaration must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, that he is satisfied that the fingerprints and photograph appearing on the declaration are those of the person intending to make the firearm, and that no information is available which would indicate that the declarant will use the firearm for other than lawful purposes.

No forms will be approved where the fingerprints are smudged. **NOTE AMPUTATIONS WHERE APPLICABLE.**

1—Right thumb	2—Right forefinger	3—Right middle finger	4—Right ring finger	5—Right little finger
6—Left thumb	**7—Left forefinger**	**8—Left middle finger**	**9—Left ring finger**	**10—Left little finger**

Plain impression of the four fingers taken simultaneously - LEFT HAND	Left thumb	Right thumb	Plain impression of the four fingers taken simultaneously - RIGHT HAND

AFFIX PHOTOGRAPH HERE (APPROX. 2" X 2")

19. IMPORTANT NOTICE

Before your declaration can be considered, it will be necessary that you securely attach to each copy thereof, in the space provided therefor, an unmounted individual photograph of yourself taken within one year of the date of this declaration. Proofs, indistinct pictures, tintypes, or group photographs will not be accepted. Photographs must at all times remain securely attached to each copy of the declaration.

20. DATE OF BIRTH *(Month, day and year)*

21. I hereby certify that the fingerprints and photograph hereon are those of the declarant and I have no information which would indicate that the declarant will use the firearm for other than lawful purposes.

DATE	SIGNATURE AND TITLE	ORGANIZATION AND ADDRESS

INSTRUCTIONS

1. Firearm.—The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barfel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848(1), I. R. C.)

2. Machine Gun.—The term "machine gun" means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger. (Sec. 5848(2), I. R. C.)

3. Muffler or Silencer.—The term "muffler" or "silencer" includes any device for silencing or diminishing the report of any portable weapon, such as a rifle, carbine, pistol, revolver, machine gun, submachine gun, shotgun, fowling piece, or other device from which a shot, bullet, or projectile may be discharged by an explosive, and is not limited to mufflers or silencers for "firearms" as defined in section 5848 of the Internal Revenue Code.

4. Rate of tax for making a firearm.—The tax upon the making of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) is $200. (Sec. 5821(a), I. R. C.)

5. Preparation of the declaration of intent to make a firearm and payment of tax.—Pursuant to section 5821 of the Internal Revenue Code, and except as otherwise provided, every person seeking to make a firearm must make a declaration on this form, in duplicate, for each firearm. If the maker is an individual, he shall affix his fingerprints, attach to each copy of the declaration an individual photograph of himself taken within one year prior to the date of such declaration, and furnish all other data required on the declaration. Upon completion of the declaration there must be affixed by the person proposing to make the firearm a $200 "National Firearms Act" stamp in the proper space, and cancel such stamp by writing his initials and the date thereon in ink. Both copies of the declaration must then be forwarded to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington, D. C., 20224.

6. Disposition of declaration of intent to make a firearm.—If approved, the Director will return the original copy, with stamp affixed, to the maker of the firearm and will retain the duplicate. The maker of the firearm shall not, under any circumstances, make the firearm until the approved declaration is received from the Director. The original declaration must be retained by the applicant and be available at all times for inspection by Government officers until such time as the firearm may be subsequently transferred.

7. Exemptions from use of declaration of intent to make a firearm.—Pursuant to section 5821 (b) of the Internal Revenue Code, manufacturers who have registered and paid special tax provided for in section 5801 (a) of the Code, persons making a firearm from another firearm with respect to which tax has been paid, prior to such making, under section 5821(a) of the Code and persons making a firearm for the use of (a) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (b) any peace officer or any Federal officer designated by regulations of the Secretary, shall not be required to file a declaration of intent to make a firearm or required to pay tax to make such firearm, but should consult the applicable regulations to ascertain what reports are required.

8. Procedure where firearm is not made.—In the event that a declaration to make a firearm is executed and stamp affixed and thereafter such intent is abandoned and the firearm is not made, the maker may file a claim on Form 843 for redemption of the stamp with the District Director of Internal Revenue for his district. Such claim must be accompanied by the declaration to which the stamp is affixed.

9. Penalties.—Any person who violates or fails to comply with any of the requirements of Chapter 53 of the Internal Revenue Code shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than 5 years, or both, in the discretion of the court. Moreover, any firearm involved in any violation of the provisions of Chapter 53 of the Internal Revenue Code or any regulations promulgated thereunder shall be subject to seizure and forfeiture.

10. Scope of tax on making a firearm.—The provisions of section 5821 of the Internal Revenue Code relating to the making of a firearm are applicable to persons within the States of the United States, and the District of Columbia.

APPENDIX B

FORM 4 (FIREARMS)
(REV. AUG. 1963)

U. S. TREASURY DEPARTMENT – INTERNAL REVENUE SERVICE

APPLICATION AND ORDER FOR TRANSFER OF FIREARM

(Chapter 53, Internal Revenue Code)

(Execute in duplicate. Read instructions carefully before completing form.)

THE FOLLOWING ITEMS WILL BE COMPLETED BY APPLICANT

The undersigned hereby makes application for the transfer of a firearm to him as required by Section 5814 of the Internal Revenue Code.

1. DATE

2. NAME *(Individual (include trade name, if any), trust, estate, partnership, association, company, or corporation)*

3. ADDRESS *(Number, street, city or town, zone, State)*

4. NAME AND ADDRESS OF PERSON AUTHORIZED TO EXECUTE THIS APPLICATION IF APPLICANT IS OTHER THAN AN INDIVIDUAL

5. HAVE YOU BEEN CONVICTED OF A FELONY? ☐ YES ☐ NO

I declare under the penalties of perjury that the firearm is being purchased for a lawful purpose and that the answers given in response to questions 2 to 5 inclusive are, to the best of my knowledge and belief, true, correct, and complete.

6. SIGNATURE OF APPLICANT

7. TITLE OR STATUS *(Individual, member of firm, if officer of corporation, give title)*

Information called for in items 20, 21 and 22 on reverse must be furnished, unless applicant is other than an individual.

THE FOLLOWING ITEMS WILL BE COMPLETED BY PERSON DESIRING TO TRANSFER THE FIREARM

8. KIND OF FIREARM *(Machine gun, submachine gun, shotgun or rifle, muffler or silencer, or any other weapon, etc.)*

9. LENGTH OF BARREL *(Inches)*	10. MODEL	11. CALIBER OR GAUGE	12. SERIAL NUMBER

13. OTHER MARKS OF IDENTIFICATION	14. NAME AND ADDRESS OF MANUFACTURER OF FIREARM *(If known)*

15. NAME AND ADDRESS OF TRANSFEROR *(Print or type name of firm or individual) (Number, street, city or town, zone, State)*

A $5.00 or $200.00 "NATIONAL FIREARMS ACT" stamp may be obtained from your DISTRICT DIRECTOR OF INTERNAL REVENUE and must be securely affixed by the transferor in this space and canceled by writing his initials and the date thereon in ink. When completed, this order form in duplicate must be transmitted to the DIRECTOR, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, WASHINGTON 25, D. C.

16. BY *(Signature)*

17. TITLE OR STATUS *(Individual member of firm, if officer of corporation, give title. If special-tax payer, give registry number)*

DO NOT WRITE IN THIS SPACE

THE APPLICATION AND ORDER FORM HAS BEEN EXAMINED AND THE TRANSFER OF THE FIREARM DESIGNATED HEREIN IS

☐ APPROVED

☐ DISAPPROVED FOR THE FOLLOWING REASON:

18. DATE

19. SIGNATURE *(Director, Alcohol and Tobacco Tax Division)*

FORM 4 (FIREARMS) (REV. 8-63)

20. FINGERPRINTS (under no circumstances will this application be considered without individual's fingerprints):

The fingerprints must be clear for accurate classification and should be taken before someone properly equipped to take them.

The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant, and that he has no information which would indicate that the applicant will use the firearm for other than lawful purposes.

No order forms will be accepted where the fingerprints are smudged. **NOTE AMPUTATIONS WHERE APPLICABLE.**

1—Right thumb	2—Right forefinger	3—Right middle finger	4—Right ring finger	5—Right little finger

6—Left thumb	7—Left forefinger	8—Left middle finger	9—Left ring finger	10—Left little finger

Plain impression of the four fingers taken simultaneously LEFT HAND	Left thumb	Right thumb	Plain impression of the four fingers taken simultaneously RIGHT HAND

AFFIX PHOTOGRAPH HERE (APPROX. 2" X 2")

21. IMPORTANT NOTICE

Before your application can be considered, it will be necessary that you securely attach to each copy thereof, in the space provided therefor, an unmounted individual photograph of yourself taken within one year of the date of this application. Proofs, indistinct pictures, tintypes, or group photographs will not be accepted. Photographs must at all times remain securely attached to each copy of the application.

22. DATE OF BIRTH *(Month, day and year)*

23. I hereby certify that the fingerprints and photograph hereon are those of the applicant, and I have no information which would indicate that the applicant will use the firearm for other than lawful purposes.

DATE	SIGNATURE AND TITLE	ORGANIZATION AND ADDRESS

INSTRUCTIONS

1. PREPARATION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM AND PAYMENT OF TAX.—It is preferred that this form be prepared by use of a typewriter, using carbon paper to make an exact duplicate. Pen and ink may be used, but under no circumstances may a lead pencil be used. Pursuant to section 5814 of the Internal Revenue Code, and except as otherwise provided, every person seeking to obtain a firearm must make a separate application, in duplicate, for each firearm on this form to the transferor. If the applicant is an individual, he shall affix his fingerprints, attach to each copy of the application an individual photograph of himself taken within one year of the date of such application, and furnish all other data required on the form. The transferor must furnish the information called for on the form relating to the identification of the firearm. Upon completion of the form by the applicant and the transferor, the latter will affix a $5 or $200 "National Firearms Act" stamp, on the original form only, in the proper space, and cancel such stamp by writing his initials and the date thereon in ink. If any questions arise concerning the preparation of this form please contact the nearest Alcohol and Tobacco Tax Office of the Internal Revenue Service.

2. DISPOSITION OF APPLICATION AND ORDER FOR TRANSFER OF FIREARM.—The transferor will forward both copies of the form to the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D. C. If approved, the Director, Alcohol and Tobacco Tax Division, will return the original to the transferor for delivery to the applicant, with the firearm, and will retain the duplicate. The transferor shall not, under any circumstances, deliver the firearm to the applicant until the approved form, with the "National Firearms Act" stamp attached, is received from the Director, Alcohol and Tobacco Tax Division. The form must be retained by the transferee and be available at all times for inspection by Government officers until such time as the firearm may be subsequently transferred. If the application and order form is disapproved, the original with the "National Firearms Act" stamp affixed thereto will be returned to the transferor.

3. PROCEDURE WHERE FIREARM IS NOT TRANSFERRED.—In the event that the form is executed and stamp affixed without the transfer of the firearm being made, the transferor may file a claim on Form 843 for the redemption of the stamp with the District Director of Internal Revenue for his district. Such claim must be accompanied by the form to which the stamp is affixed.

4. PROCEDURE WHERE FIREARM IS TO BE SUBSEQUENTLY TRANSFERRED.—Where a firearm is to be subsequently transferred, a new application and order form covering such proposed transfer must be filed with the Director, Alcohol and Tobacco Tax Division.

5. RATE OF TAX ON THE TRANSFER OF A FIREARM.—The tax on the transfer of any firearm is $200: Except, that the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under section 5848(5), shall be at the rate of $5. (Sec. 5811(a), I.R.C.)

6. DEFINITIONS.—

(A) Felony—Any offense punishable by death or imprisonment for a term exceeding one year.

(B) Firearm—The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. (Sec. 5848(1), I.R.C.)

7. SCOPE OF TAX ON THE TRANSFER OF A FIREARM.—The provisions of section 5814 of the Internal Revenue Code relating to the application and order forms are applicable to persons within the States of the United States and the District of Columbia.

8. WARNING.—It shall be unlawful for any person who has not in his possession a stamp-affixed order (Form 4 (Firearms)) as provided in section 5814 of the Internal Revenue Code to ship, carry, or deliver any firearm in interstate commerce. (Sec. 5855, I.R.C.)

9. PENALTIES.—ANY PERSON WHO VIOLATES OR FAILS TO COMPLY WITH ANY OF THE REQUIREMENTS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE SHALL, UPON CONVICTION, BE FINED NOT MORE THAN $2,000 OR BE IMPRISONED FOR NOT MORE THAN 5 YEARS, OR BOTH, IN THE DISCRETION OF THE COURT. MOREOVER, ANY FIREARM INVOLVED IN ANY VIOLATION OF THE PROVISIONS OF CHAPTER 53 OF THE INTERNAL REVENUE CODE OR ANY REGULATIONS PROMULGATED THEREUNDER SHALL BE SUBJECT TO SEIZURE AND FORFEITURE.